U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]
Page 2

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 4, 2000. The proffered wage as stated on the Form ETA 750 is $2,067.87 per month, which amounts to $24,814.44 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1999.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of $300,000, and to currently employ five workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 6, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's tax returns for the year 2000 as well as 2001, and quarterly wage reports or W-2 forms to demonstrate wages actually paid to the beneficiary.

In response, the petitioner resubmitted its corporate income tax return for 2001 along with a Form 1065, U.S. Return of Partnership Income for 2001 and 2000. On the petitioner's corporate income tax return, the petitioner

indicated that its effective date as an S corporation was June 2001. On the petitioner's tax returns on Form 1065, it indicates it was previously organized as a limited liability company (LLC).

The tax returns reflect the following information for the following years:

As an S Corporation

	2001
Net income[1]	-$21,758
Current Assets	$14,218
Current Liabilities	$32,000
Net current assets	-$17,782

As an LLC

	2001	2000
Net income[2]	-$1,054	$2,511
Current Assets	$0	$1,131
Current Liabilities	$0	$4,170
Net current assets	$0	-$3,039

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the quarters ending March 31, 2002, June 30, 2002, September 30, 2002, and December 31, 2002 and Form W-2, Wage and Tax Statement, the petitioner issued to the beneficiary in 2002. The quarterly wage reports and Form W-2 reflect that the petitioner actually employed and paid wages to the beneficiary of only $15,489, $9,325.44 less than the proffered wage, in 2002. The petitioner also submitted a copy of the beneficiary's individual income tax return for 2002, which also corroborates receiving wages in the amount of $15,489 from the petitioner in 2002.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 9, 2003, denied the petition.

On appeal, counsel asserts that the petitioner is financially stable as evidenced by its four facilities and expectation in increasing its net profits because of a decrease in expenses. Additionally, counsel states that the petitioner underwent corporate restructuring in June 2001, which led to refurbishing and renovating its facilities. Counsel also states that the petitioner has sufficient cash reserves as illustrated by bank balances. Counsel finally states that the beneficiary is already working for the petitioner but she is working part-time and that is why she received partial instead of full wages in the past. The petitioner submits copies of licenses issued to the petitioner for three facilities; an application for a license for a fourth facility; an unaudited balance sheet; a bank account statement for the petitioner dated May, 30, 2003 reflecting a balance of $54,294.35; and Forms W-2, Wage and Tax Statements, issued to the beneficiary in 2000, 2001, and 2002, as well as the beneficiary's individual income tax returns.

The visa petition and accompanying labor certification application provide discrepant information concerning the petitioning entity and the location of the proffered position. The petitioning entity on the petition is "Givencare

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[1] Ordinary income (loss) from trade or business activities on Line 21.

[2] Ordinary income (loss) from trade or business activities on Line 22.

Corporation" and the petitioner's employer identification number (EIN) on the petition is 95-4862269. The petition clearly states that the proffered position's actual work location will be at its "Villa Fontana" facility located in Anaheim Hills, California. The labor certification application is filed by "Villa Fontana, LLC," and, after amendment during its internal process through the Department of Labor (DOL), clearly states that the proffered position's work location will be at its Villa Fontana, LLC facility located in Manhattan Beach, California. The beneficiary states on ETA 750B that she is currently working for Villa Fontana, LLC in Redondo Beach, California.

Additionally, the petitioner's corporate tax return for 2001 is filed as "Givencare Corporation" under the EIN 95-4862269. The petitioner's tax filings as an LLC in 2000 and 2001, however, are for Villa Fontana, LLC with the EIN 95-4599399.

The record contains no evidence that the petitioner qualifies as a successor-in-interest to Villa Fontana, LLC. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

At the outset, the successor-in-interest issue is insurmountable for approval of this instant petition.[3] The petitioner has the burden of proving its case and should have provided documentary evidence of its acquisition of Villa Fontana, LLC's rights, duties, and obligations. Assuming, *arguendo*, that successorship could be proven, the petitioner and Villa Fontana, LLC have not established that either entity has the ability to pay the proffered wage, as will be discussed below.

Villa Fontana, LLC, structured as an LLC, indicates that the petitioner's owners' assets and liabilities may be considered in the scope of the petitioner's ability to pay the proffered wage up to the amount of capitalization put into the business to start it up. There is no information in the record of proceeding concerning the petitioner's owners' capitalization input and unencumbered current assets available for consideration in addition to Villa Fontana, LLC's reported financial situation as reflected on its tax returns.

The petitioner, structured as an S corporation, separates the petitioner and its owners. Because a corporation, whether structured as an S corporation or an LLC, is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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[3] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The unaudited financial statements that counsel submitted on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the balance sheets will not be considered.

Additionally, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000, 2001, or 2002.

The Forms W-2 demonstrate that the petitioner paid wages to the beneficiary in the amount of $15,489 in 2002, which is $9,325.44 less than the proffered wage. Thus, the petitioner is obligated to show that it can pay $9,325.44 in 2002.

On appeal, counsel submits additional Forms W-2 in 2000[4]. One Form W-2 shows that Villa Fontana, LLC, with EIN 95-4599399, paid the beneficiary $16,280 in 2000. Also submitted is a Form W-2 from "West Carson Res. Care Ctr.," with EIN 33-0479961, also a facility with a license certificate issued to the petitioner. "West Carson Res. Care Ctr." paid the beneficiary $850 in wages in 2000. There is also an illegible Form W-2 for 2000 in the record of proceeding. Because [redacted] has a different EIN than Villa Fontana, LLC and the petitioner, there is no way to recognize [redacted] obligation to pay the proffered wage.

[4] The AAO is exercising favorable discretion in accepting this evidence. The AAO is under no obligation to consider this evidence since the director had specifically requested it in a request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Thus, "West Carson Res. Care Ctr.'s" actual payment of wages to the beneficiary will not be considered in 2000. There is only evidence of the beneficiary being paid $16,280 in 2000, which is $8534.44 less than the proffered wage. Thus, Villa Fontana, LLC, if properly a predecessor to the petitioner, would be obligated to show that it could pay $8534.44 in 2000.

On appeal, counsel also submits additional Forms W-2 for 2001.[5] One Form W-2 shows that Villa Fontana, LLC, with EIN 95-4599399, paid the beneficiary $5,665 in 2001. Also submitted is a Form W-2 from the petitioner, which paid the beneficiary $9,750 in wages in 2001. There is also a Form W-2 from "West Carson Res. Care Ctr.," with EIN 33-0479961, which paid the beneficiary $100 in wages in 2001. As stated above, because "West Carson Res. Care Ctr." has a different EIN than Villa Fontana, LLC and the petitioner, there is no way to recognize "West Carson Res. Care Ctr.'s" obligation to pay the proffered wage being offered to the beneficiary. Thus, "West Carson Res. Care Ctr.'s" actual payment of wages to the beneficiary will not be considered in 2001. There is evidence of the beneficiary being paid $5,665 by Villa Fontana, LLC in 2001, which is $19,149.44 less than the proffered wage. Thus, Villa Fontana, LLC, if properly a predecessor to the petitioner, would be obligated to show that it could pay $19,149.44 in 2001. The petitioner also illustrated that it paid $9,750 in wages in 2001, which is $15,064.44 less than the proffered wage. Thus, the petitioner, if properly a successor-in-interest to Villa Fontana, LLC, would also be obligated to show that it could pay $15,064.44 in 2001.

If the petitioner, and its successor-in-interest (if valid), do not establish that they employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on their federal income tax returns, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In the instant case, the petitioner and Villa Fontana, LLC show net income in the amount of -$21,758 in 2001, and -$1,054 in 2001 and $2,511 in 2000, respectively. A negative amount cannot cover the $15,064.44 in 2001 the petitioner needs to show it can pay in 2001 in order to prove its ability to pay the proffered wage. Additionally, a negative $1,054 in 2001 and positive $2,511 in 2002 in net income cannot cover the $19,149.44 in 2001 and $8534.44 in 2000 it would need to show it could pay in each respective year in order to prove its ability to pay the proffered wage. Thus, neither the petitioner nor Villa Fontana, LLC, illustrated an ability to pay the proffered wage out of their net income in 2000 or 2001. No tax returns were produced for 2002, and therefore, the petitioner has not provided supplementary evidence for that year to overcome the deficiency in the amount of wages actually paid to the beneficiary in that year.

Nevertheless, the petitioner's/successor-in-interest's, or predecessor's, net income is not the only statistic that can be used to demonstrate a petitioner's/successor-in-interest's or predecessor's ability to pay a proffered wage. If

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[5] *See* note 4, *supra*.

the net income the petitioner/successor-in-interest or predecessor entity demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's/successor-in-interest's and predecessor's assets. The total assets, however, include depreciable assets not used in business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the total assets must be balanced by liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, on both Forms 1120S and 1065. Its year-end current liabilities are shown on lines 16 through 18 on Form 1120 and Lines 15 through 17 on Form 1065. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets reported by the petitioner and Villa Fontana, LLC in 2000 and 2001, however, were negative or zero. Thus, neither the petitioner nor Villa Fontana, LLC could pay the proffered wage out of its net current assets in 2000 or 2001. No financial information was provided in 2002.

The petitioner has failed to establish that it is a successor-in-interest to Villa Fontana, LLC. Even if they could establish successorship, both entities failed to submit evidence sufficient to demonstrate that they had the ability to pay the proffered wage during 2000, 2001, or 2002 out of net income or net current assets.[7] No other source for paying the proffered wage was provided. Counsel suggested on appeal that the petitioner is financially stable based on its four facilities, expectation in increasing its net profits because of a decrease in expenses, and corporate restructuring that led to refurbishing and renovating its facilities. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] Even if the petitioner and Villa Fontana, LLC's obligation to pay the proffered wage were split for 2001, considering the restructuring occurred then, they still couldn't meet half of their obligations.